Filed 6/13/07 P. v. Mejia CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. AGUSTIN MEJIA, Defendant and Appellant.	A113574 (Contra Costa County Super. Ct. Nos. 5-060206-0; 5-050280-7; 4-144006-4)

Defendant pleaded no contest to charges of being a felon in possession of a firearm (Pen. Code § 12021, subd. (a)(1)[1]), possession of a short-barreled shotgun (§ 12020, subd. (a)(1)), and being a convicted person in possession of ammunition (§ 12316, subd. (b)(1)), and was placed on probation for three years. He appeals, contending that the trial court improperly denied his motion to suppress evidence pursuant to section 1538.5. We affirm.

BACKGROUND

On November 25, 2005, at approximately 5:14 p.m., Pittsburg Police Officer Nicholas Goldman responded to 511 West 10th Street, with his partner Officer Galer.[2]

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[1] All further section references are to the Penal Code, unless otherwise indicated.

[2] Since defendant pleaded no contest before trial, the factual summary is taken from the transcript of the preliminary hearing.

The police had received a call reporting that a man named Agustin had brandished a shotgun at that location. On the way to the location, Officer Galer told Officer Goldman that he'd had prior contacts with a person named Agustin at that address, and that he stayed in a rear bedroom at the residence. Upon arriving, officers set up a perimeter around the residence. Officers Goldman and Galer approached the residence, along with two other officers, through a narrow walkway on the east side of the house. Galer announced "Pittsburg Police Department" as they approached, and ordered defendant to come outside. Defendant complied and exited the residence. Defendant did not have the shotgun with him. Officer Goldman identified defendant as Agustin.

Officers Galer and Kessler, and Sergeant Semas, then entered the residence to perform a protective sweep for additional suspects. The officers opened what looked like a storage area door in defendant's room, which was big enough for a person to enter; it was unlocked. They entered the storage area to look for additional subjects that might be inside. Immediately inside the door, Officer Galer saw a shotgun on top of a duffel bag and seized it. Galer took the shotgun outside and examined it. The weapon was a 16-gauge pump action shotgun with the stock sawed off; the barrel was shortened to 16 1/2 inches. The overall length of the shotgun was 25 1/4 inches.

Officer Galer informed Officer Goldman that defendant was on felony probation for a violation of Vehicle Code section 10851, and that he had a search clause. Officer Goldman searched defendant's room under the search clause and found five 16-gauge shotgun shells inside tennis shoes, about three feet from the storage area door. Goldman looked inside the storage area (the door was open) and saw that it extended under the entire lower portion of the house and was three to three-and-a-half feet tall.

After the probation search, Officer Goldman contacted the person who had originally reported someone brandishing a shotgun, Carlo Dameon. Dameon said he had an argument with defendant, and that defendant came alone out of the passageway to his home, which passageway the officers had used to enter defendant's bedroom. Dameon indicated that defendant was holding a shortened shotgun in his hands and he said that he

was going to kill Dameon. Dameon identified the shotgun seized from the storage area in defendant's room as the one defendant had pointed at him.
Defendant was on felony probation with search clauses in two separate cases, at the time.

Defendant was charged by complaint with being a felon in possession of a firearm, possessing a short-barreled shotgun, and being a convicted person in possession of ammunition. Defendant's motion to suppress pursuant to section 1538.5 was brought at the preliminary hearing and was denied; defendant was held to answer on the charges, and an information was filed alleging the same.[3] Defendant renewed his motion to suppress, pursuant to section 995, which was again denied. Defendant pleaded no contest to the charges, was placed on three years' felony probation, and was ordered to serve 300 days in county jail. This timely appeal followed.

DISCUSSION

On appeal, defendant contends that the trial court improperly denied his motion, and renewed motion, to suppress, arguing that the police officers' initial warrantless entry into his home and search of the storage area that led to the discovery of the shotgun were unconstitutional. Respondent argues that the police were warranted in entering defendant's residence and looking in the storage area, to conduct a protective sweep, under *Maryland v. Buie* (1990) 494 U.S. 325 (*Buie*), and that even if they were not, the shotgun would inevitably have been discovered during the probation search. Respondent has the better argument here.

We surmise that both parties agree with the general principles of law that might justify a warrantless entry in the current case: that under the correct circumstances, an officer may enter a subject's residence without a search warrant, either under the exigent circumstances exception to the search warrant requirement (see *Minnesota v. Olson* (1990) 495 U.S. 91, 100) or to conduct a protective sweep. (*Buie, supra,* 494 U.S. 325,

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[3] Petitions to revoke defendant's probation in two other felony dockets (4-144006-4 and 5-050280-7) were also filed and are the subject of the current appeal.

336-337.) Their disagreement is in the application of the general principles to the unique facts of this case.

An officer may enter a home without a warrant if exigent circumstances warrant it: if he has probable cause to believe that the imminent destruction of evidence or the escape of a suspect, or imminent harm or danger to someone inside or outside the residence, would otherwise result. (*People v. Celis* (2004) 33 Cal.4th 667, 676; *Brigham City, Utah v. Stuart* (2006) 126 S.Ct. 1943.) One exigent circumstance which may justify a warrantless entry into a home, the danger to police or others present at the scene, may also justify a protective sweep. The protective sweep is limited to a search of areas where a suspect might be hiding and from which he might launch an immediate attack, and includes areas such as closets. (*Maryland v. Buie*, *supra*, 494 U.S. 325, 327, 334, 335.)

In *Buie*, the officer was legally inside the residence to arrest the defendant under an arrest warrant. The Supreme Court held that a limited sweep could be conducted, without probable cause or reasonable suspicion, of the area immediately adjacent to the arrest; to conduct a sweep of the remainder of the home, the officer must have a reasonable suspicion that other suspects are present on the premises, who might pose a danger. (*Id*. at p. 335.) The reasoning of *Buie* has subsequently been extended to situations where the officer is lawfully in the residence for reasons other than a lawful arrest, such as a consent entry or entry to execute a search warrant. Some courts have extended the reasoning of *Buie* to permit officers to conduct a protective sweep of a residence even when a suspect is arrested outside.

As the California Supreme Court recently explained, "A *Buie* sweep is unlike warrantless entry into a house based on exigent circumstances (one of which concerns the risk of danger to police officers or others on the scene); such an entry into a home must be supported by *probable cause* to believe that a dangerous person will be found inside. [Citation.] A protective sweep can be justified merely by a *reasonable suspicion* that the area to be swept harbors a dangerous person. [Citation.] Like the limited patdown for weapons authorized by *Terry v. Ohio* [citation], a protective sweep may not be based on

‘a mere “inchoate and unparticularized suspicion or ‘hunch . . . .’ ” ’ ” (*People v. Celis, supra,* 33 Cal. 4th at p. 678.) The *Celis* court recognized that some courts have limited *Buie* sweeps to circumstances where the officer is conducting a lawful arrest inside the home, others have permitted a sweep after other types of lawful entries, and “others have allowed a protective sweep of a house when the officers were not inside the house at all, but had arrested a suspect just outside; in these cases the officers then entered the house to conduct the sweep.” (*Id*. at p. 678.)

The court in *Celis* found it unnecessary to reach the issue of whether a *Buie* sweep (*Buie, supra,* 494 U.S. 325) could be warranted when a defendant is arrested or detained outside the home, as the court determined that the officers in that case did not have the requisite reasonable suspicion. We believe that the facts of the present case are indicative of why such a limited sweep might be warranted, even when the officers are not otherwise lawfully inside the home. The ultimate issue is whether the officers’ conduct was reasonable under the Fourth Amendment. As the Court explained in *Brigham City, Utah v. Stuart*, “It is a ‘ “basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.” ’ [Citations.] Nevertheless, because the ultimate touchstone of the Fourth Amendment is ‘reasonableness,’ the warrant requirement is subject to certain exceptions.” (*Brigham City, Utah v.* Stuart, supra, 126 S.Ct. at p. 1947.) The ultimate issue is whether “the needs of law enforcement [are] so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.” (*Ibid*.)

Here the police had received a report that defendant had brandished a shotgun outside his residence. He exited his residence at the officers’ request, but did not have the shotgun with him. The officers certainly could not be expected to simply leave the scene without locating and retrieving the shotgun. While the officers could have “frozen” the scene in order to obtain a search warrant (*Segura v. United States* (1984) 468 U.S. 796, 809-813)**,** to do so without first assuring that someone else was not in the home with access to the shotgun clearly would have placed themselves and others at the scene in potential danger. The officers did not know if other subjects were inside the residence,

but since defendant lived in a rear bedroom of the residence, they could reasonable infer that others resided there. Under the totality of circumstances in the present case, a limited sweep of the residence to assure that no one else was present was both prudent and reasonable under the Fourth Amendment; nothing more is required. The Fourth Amendment does not require that police officers risk their lives, or those of innocent bystanders.

As it ended up, the officers did not have to freeze the scene and obtain a search warrant, as it was discovered that defendant was on probation with a search clause. Even if the officers improperly conducted the protective sweep that led to their discovery of the shotgun, the weapon would inevitably have been discovered pursuant to the lawful probation search they subsequently conducted. (*Nix v. Williams* (1984) 467 U.S. 431, 444.) Defendant argues that the officers would not have conducted the probation search had they not discovered the shotgun first. To the contrary, with a fresh report of the brandishing of a shotgun by defendant outside his residence, the officers would have been even more likely to have conducted the probation search had they not already secured the weapon. Once the police verified that defendant was on probation with a search clause, it was highly unlikely that they would not have conducted a probation search, in order to quickly and efficiently locate and secure the weapon. Since the shotgun would inevitably have been discovered during the probation search, it is admissible despite any illegality in its seizure. (*Nix v. Williams*, *supra*, 467 U.S. at p. 444.)

CONCLUSION

The shotgun was legally seized during a sweep of defendant's residence. In any event, the shotgun would inevitably have been discovered pursuant to a lawful probation

search of defendant's room. The trial court did not err in denying defendant's motion to suppress. The judgment is affirmed.

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SEPULVEDA, J.

We concur:

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RUVOLO, P. J.

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REARDON, J.